IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197____

NO. 78-552

SAM BUILTA,

Petitioner

VS

GENERAL ELECTRIC CREDIT CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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915 Victoria Street
Laredo, Texas 78040
Attorneys for Petitioner

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SAM BUILTA,
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VS

GENERAL ELECTRIC
CREDIT CORPORATION,
Respondent

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

_____

The Petitioner, Sam Builta, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Fifth Circuit (affirming the judgment of the District Court without opinion in Civil Rule 21) entered in this proceeding on June 7, 1978, and to the order of that court dated July 5, 1978, denying the Petitioner's Petition for Rehearing.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit (apparently not reported) appears at pages App. 37 thru App. 38 of the Appendix attached hereto.

The opinion of the District Court appears at pages App. 15 thru App. 34 of the Appendix attached hereto, but apparently is unreported. The order denying the Petition for Rehearing in the United States Court of Appeals appears on page App. 58 of the Appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. 37 thru 38)

was entered on June 7, 1978. A timely Petition for Rehearing was denied on July 5, 1978. The jurisdiction of this Court is invoked under the provisions of 28 USC Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Courts below err in directing judgment in favor of the Defendant, GECC, on the ground that the relationship between the Defendant, GECC, and General Electric Corporation carried with it the degree of circumscribed self-interest contemplated by the qualified business privilege defense, which necessitated a finding of malice on the part of the defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

The Petitioner, Sam Builta, is a retail appliance dealer. He had one dealership in Del Rio, Texas (sole proprietorship), one in Uvalde, Texas (a partnership), and one in Laredo, Texas (a corporation of which he was President and a principal stockholder). All dealerships sold General Electric appliances and handled most of their inventory and customer financing through the defendant, GECC, a wholly owned subsidiary of the General Electric Company. The Laredo corporation was unable to pay its debts, and the defendant, GECC recovered a judgment against that corporation. At or about the same time, the General Electric Corporation cut off all credit of the plaintiff at the Del Rio and Uvalde stores. The Plaintiff in his complaint filed herein alleges that representatives of the defendant company, GECC,

stated orally and in writing to representatives of plaintiff's suppliers and associates (including General Electric Corporation) that the plaintiff was solely responsible for the debts of the Laredo Corporation and was a guarantor of the corporation's debts. The plaintiff alleges that such statements are false and are libelous and slanderous and asks damages for his loss of credit, the damage to his reputation, loss of profits, mental anguish and other related matters. The case was submitted to the jury on special interrogatories and the answers of the jury appear at App. 17 thru 19 of the Appendix , in the opinion of the District Court. The plaintiff was not permitted to introduce the alleged libelous statements and the case was submitted on the question of whether the representatives of GECC made slanderous statements to representatives of General Electric Corporation.

No issue was submitted to form the basis of a finding of conditional privilege.

The District Court found that there was sufficient evidence to support each of the findings, but directed a verdict for the defendant based on a finding by the Court of conditional privilege and the jury finding of no malice.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

Jurisdiction of the District Court was based on the provisions of 28 USC Section 1332.

REASONS FOR GRANTING THE WRIT

The entire record reflects that the representatives of the defendant company, the representatives of General Electric Corporation, and the counsel for defendant at all times testified or stated in open court that the two companies were separate and distinct, the case was not tried on the issue of conditional privilege, and there is nothing

in this entire record to justify a finding of conditional privilege.

ARGUMENT

Plaintiff states that the decision of the District Court, concurred in by three appellate judges without opinion, is unfair, unjust and injudicious and should not be allowed to stand.

The bias and prejudice of the Trial Judge throughout the pretrial and trial proceedings is made clear by the fact that over a period of approximately four years, the Plaintiff was constantly and consistently denied the right to amend his pleadings. During the trial of the case, the Court made the following statements (after First Motion for Directed Verdict by Defendant):

"THE COURT: The problem the Court has, of course, is it is a jury case.

If it were a non-jury case, I would find that the Plaintiff has failed by a preponderance of

the evidence to show any element of an actionable libel or slander.

I would find there was no proof or publication.

There is no proof that anyone of the third party understood any words in a slanderous or defamative sense.

I don't remember any credible evidence or relevant evidence that would show that the Defendant said that Mr. Builta owed a debt he would not pay and that is what I understood the Plaintiff says the slander statement was, that the plaintiff owed a debt he would not pay.

It's clear to me that if I were the trier of facts, I would say that the plaintiff has not proved his case at all on any evidence that was admissible.

I think I allowed some evidence admitted that might should have precluded out of an abundance of caution.

But every time you take a case away from the jury, you get reversed and I have never taken a civil case away from a jury and I have never been reversed in a jury case. I have never been reversed on admissibility of evidence or on the charge in a civil case.

So I am going to overrule your motion and let it go to the jury.

I will have more time to look at it later on in case the jury rules for the Plaintiff because you only have a few witnesses to put on and we have been in this case sometime and the jury has heard a lot of evidence and I think the fairest and safest thing to do, because I just cannot say at this time under that Bowen against Shipman, I just cannot say that I am compelled to grant the defendant's motion.

So we will hear your evidence in the morning. "

(Lines 23 thru 25, p. 527, Lines 1 thru 25, p. 528, and Lines 1 thru 12, p. 529 of Record on Appeal). (after renewal of Defendant's Motion for Directed Verdict, the Court stated:

"The Court: Well, in response to that, first, I will overrule your motion.

Secondly, I will say for the record that If I was trying the case without a jury I would find for the defendant.

Thirdly, that I will, in the event a judgment is entered, or at least the verdict of the jury is entered against the defendant, I will seriously consider taking action then with the judgment, notwithstanding the verdict."
(Lines 7 thru 16 of p. 625, Record on Appeal).

It is interesting to note that at no point during these statements did the Court ever mention the qualified privilege defense.

The Petitioner's Petition for Rehearing filed in the Court of Appeals is attached hereto in its entirety because it sets forth fully and accurately the parts of the Record on Appeal pertaining to qualified privilege. The position of the defendant, GECC, General Electric Corporation and counsel for GECC at all times was that General Electric and GECC are separate corporations, are distinct separate corporate entities and operate completely independently of each other.

The Trial Judge at page 76 of the Record on Appeal stated that if GECC is a distinct corporation but a wholly owned subsidiary, but separate at the management level, that the libel would run towards General Electric as to any third party. Mr. Martin Beirne stated the Court's position was correct. (pp. 76 and 77 of Record on App.)

Mr. Beirne further represented to the Court that there are two distinct corporate entities

--two distinct operations before the Court. (p. 105 ROA). In response to the following question from the Court, "Is it a slander for an employee of the parent corporation to tell an employee of the wholly owned subsidiary of a parent corporation that one of the customers of both of them is financially irresponsible," Mr. Martin Beirne responded, "If you have two separate and distinct corporations." The Court then stated, "Like we have here?"

Mr. Sam Hood, lead counsel for GECC, at the trial stated to the Court that there was no possible way for GECC to be held responsible for something that GE did--that they operate as separate entities.

At the time the Trial Judge wrote his opinion, it is probable that he did not have a Transcript of the Evidence before him. But it is difficult to perceive how three appellate judges could affirm his decision in the face of this record and without

•It is true that the Courts have the authority under Rule 21 to render a judgment without opinion, even, as here, where petitioner in his brief set forth forty-six (46) issues presented for review. But Chief Judge Brown cautions in National Labor Relations Board vs Amalgamated Clothing Workers, 430 F2 966, 1970, 5th Circuit, that :

> "The Court recognizes that it must--the word is must--never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used."

It is equally true that this case is not a case of great importance or interest to the public at large, and that the case load of this Honorable Court is stiflingly heavy. But it is very important to this Petitioner, and it further is important that it be determined that a judgment must have a basis in the record.

The question of qualified privilege in the law of libel and slander is and always has been a question of supreme importance. To permit this entire case to hinge on a finding by the Trial Court not supported by the record is a denial of the Plaintiff's basic Constitutional right to a fair trial by an impartial judge.

SUMMARY

The record does not support a finding of qualified privilege and Petitioner is entitled to a judgment not based on a finding of qualified privilege.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. G. HORNBERGER
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915 Victoria St.
Laredo, Texas 78040
Attorneys for Petitioner
AC 512 72 2-1121

by J. G. Hornberger
J.G. Hornberger

Certificate of Service

I hereby certify that on the 30th day of September, 1978, a copy of Petitioner's Petition for a Writ of Certiorari was by me mailed to Mr. Martin Beirne of the firm of Fulbright, Crooker & Jaworski, Bank of the Southwest Bldg., Houston, Texas 77002, attorneys for Respondent.

J. G. Hornberger

In the United States District Court for the Southern District of Texas, Houston Division

Sam Builta, Plaintiff

vs | Civil Action No. 71-H-757

General Electric Credit Corporation, Defendant

Plaintiff's Original Complaint

Sam Builta, Plaintiff, complaining of General Electric Credit Corporation, defendant, respectfully alleges that:

I

The Plaintiff is a citizen of the State of Texas and resides in Valverde County, Texas. The defendant is a corporation organized and existing under the laws of the state of New York with a permit to do business in the State of Texas. Service of process may be had upon the

defendant by serving its registered agent, C. T. Corporation System, Republic National Bank Building, Dallas, Texas.

II

The matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00). Therefore, because of the diversity of citizenship between the plaintiff and the defendant, this Court has jurisdiction under the provisions of Section 1332, Title 28 of the United States Code Annotated.

III

For a number of years the plaintiff, as an officer and principal stockholder of various corporations and by and through such corporations, has operated appliance stores in Del Rio, Texas, Uvalde, Texas, and Laredo, Texas.

His Uvalde operation is known as Uvalde Appliance Company, his Del Rio operation is known as Del Rio Electric and Appliance Company, and his Laredo operation was known as Texas Appliance Centers, Inc. At all three places of business he did extensive business with the defendant company and the General Electric Company. The Laredo business was managed by another officer and stockholder of said Texas Appliance Center, Inc., one R. L. Hignight. In the Del Rio and Uvalde operations, the plaintiff was the personal guarantor of any indebtedness created by the corporations with the defendant company. In the Laredo operation the personal guaranty was not required, and he at no time assumed any personal liability for any indebtedness owing to that company. During the year 1970, the Laredo operation became insolv-

ent and the corporation known as Texas Appliance Centers, Inc. is indebted to the defendant company in the approximate sum of $25,616.06, which indebtedness is represented by a certain judgment granted by the 111th District Court of Webb County, Texas, on the 22nd day of December, 1970.

IV

Despite the fact that the defendant company well knew that the plaintiff was not personally responsible for said indebtedness the said defendant, its representatives, agents, servants and employees, embarked on a course of conduct of harassment, and intimidation designed to embarrass the plaintiff, to destroy his credit and to bankrupt his other business operations. To accomplish its purpose, the defendant, its representatives, agents, servants and employees

both in writing and orally, let it be known in the appliance trade that the plaintiff personally owed the indebtedness created by Texas Appliance Centers, Inc., that he was a guarantor of such indebtedness, that he refused to pay such indebtedness and that other companies doing business with him should refuse to grant him or his other operations any credit whatsoever. The defendant company was successful in convincing certain of the plaintiff's suppliers that such was the case. His businesses have hampered, his credit destroyed and his reputation as a businessman damaged. Even though the plaintiff requested the defendant company to cease and desist such acts, they refused to do so but continued their course of conduct as set forth above. Plaintiff states that he has suffered loss of profits which otherwise he would have made and has been

damaged by virtue of the defendant's acts in the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00).

V

The plaintiff further states that the defendant's acts were done willfully, fraudulently and maliciously and with the absolute knowledge of the falsity of the statements that were made concerning this defendant, and that therefore the plaintiff is entitled to exemplary damages in the sum of Twenty-Five Thousand Dollars ($25,000.00).

VI

Plaintiff asks for a trial by jury.

WHEREFORE, plaintiff prays that upon final hearing hereof, he have judgment against the defendant, for the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) actual damages, and Twenty-Five Thousand

Dollars ($25,000.00) exemplary damages, for costs, and that plaintiff be granted such other and further relief as the Court may deem proper to grant, at law and in equity.

/s/ J. G. Hornberger

J. G. Hornberger
915 Victoria St.
Laredo, Texas
Attorney for Plaintiff

ANSWER

(Number and Title Omitted)

Filed: August 10, 1971

TO THE HONORABLE THE SAID UNITED STATES DISTRICT COURT:

The following Answer to the Original Complaint of the Plaintiff, Sam Builta, is respectfully submitted to the Court by the Defendant, General Electric Credit Corporation:

I

Defendant General Electric Credit Corporation admits the allegations contained in Paragraph I of Plaintiff's Complaint.

II

Defendant General Electric Credit Corporation denies that it is in anywise indebted to the Plaintiff herein and, therefore, denies that the amount in controversy, exclusive of interest and costs, and made the basis of Plaintiff's action

for damages, is in excess of $10,000.00. Otherwise, Defendant admits that there is diversity of citizenship between the Plaintiff and the Defendant. Defendant, therefore, denies jurisdiction of the Court and demands proof thereof.

III

With respect to Paragraph III of said Complaint, Defendant admits that the Plaintiff, as an officer and principal stockholder, has operated the business establishments referred to in said Paragraph and that the Laredo business establishment known as Texas Appliance Centers, Inc., was at one time managed by said R. L. Hignight. Defendant admits that during the year 1970, the Laredo operation known as Texas Appliance Centers, Inc., of which the Plaintiff was president, did not fulfill its financial obligations to the Defendant and that the Defendant company found it necessary to file suit against

said Texas Appliance Centers, Inc., for the indebtedness owed it by the said Texas Appliance Centers, Inc., and did, on or about December 22, 1970, in the District Court of Webb County, Texas, recover judgment against Texas Appliance Centers, Inc., in the sum of $25,616.06, together with interest thereon, which judgment is still partially unsatisfied. Defendant has no direct knowledge or information concerning the extent of the Plaintiff's business operations in Del Rio, Uvalde and Laredo, Texas, and demands proof thereof. Defendant admits that at the time the original arrangement was made between it and Plaintiff, that the Plaintiff was the personal guarantor of any indebtedness created by Uvalde Appliance Company and Del Rio Electric and Appliance Company but did not then personally guarantee any indebtedness of

Texas Appliance Centers, Inc. Other than as specifically admitted herein, the allegations contained in Paragraph III of said Complaint are denied and proof thereof is demanded.

IV

Defendant General Electric Credit Corporation denies the allegations contained in Paragraph IV of said Complaint.

V

Defendant General Electric Corporation denies the allegations contained in Paragraph V of said Complaint.

VI

With respect to the allegations of Paragraph VI of said Complaint and the prayer therein, Defendant denies that the Plaintiff is entitled to recover any damages or is entitled to the other relief prayed for therein.

VII

Defendant would further show that Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.

VIII

For further defense, if same be necessary, Defendant would show that the Plaintiff was the president and principal stockholder of Texas Appliance Centers, Inc., and that said Company failed to meet financial commitments and obligations to the Defendant herein, making it necessary that the Defendant file suit against said company to protect itself against such indebtedness and further making it necessary that the Defendant file a writ of sequestration against said company to enforce the liens held by it and has taken no action against the Plaintiff other than that which it was legally entitled to

to take for the protection of its business interest.

WHEREFORE, PREMISES CONSIDERED, Defendant, General Electric Credit Corporation, respectfully prays this Honorable Court that upon final hearing hereof that the Plaintiff take nothing by reason of this action and that said Defendant be discharged with its costs and that it have such other and further relief, general and special, legal and equitable, to which it may be justly entitled.

Respectfully submitted,

/s/ Sam H. Hood
Sam H. Hood

OF COUNSEL:

FULBRIGHT, CROOKER & JAWORSKI
800 Bank of the Southwest Building

Houston, Texas 77002
224-7070

Attorneys for Defendant

Defendant, General Electric Credit Corporation, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, demands a trial of all issues by a jury.

/s/ Sam H. Hood
Sam H. Hood

MEMORANDUM AND ORDER

(Number and Title Omitted)

Filed: May 12, 1976

The Plaintiff in this case has sued the Defendant corporation contending that the Defendant knowingly published the false asseration that the Plaintiff was personally liable for debts owed to the Defendant that were in fact the debts of Plaintiff's corporation, Texas Appliance Centers, Inc. The case was submitted on special interrogatories to the jury. The task of this Court is now to analyze the interrogatories as they apply to Texas principles of common law slander and to determine the extent to which these principles may have been affected by the Supreme Court decision in Gertz vs. Robert Welch, Inc., 418 U.S. 323 (1974). After reviewing the law extensively, this Court is

convinced that the answers of the jury compel a decision in favor of the Defendant.

BACKGROUND FACTS

Plaintiff, Sam Builta, alleged that the Defendant, General Electric Credit Corporation, knowingly published the false asseration that he was personally liable for debts owed to the Defendant that were in fact the debts of Builta's corporation, Texas Appliance Centers, Inc. After numerous motions to exclude evidence, the Court concluded that the case could only be tried on a theory of slander because Plaintiff could show no evidence that was properly admissible to support his theory of libel. Thereafter, the Court took under advisement the Defendant's motion for a directed verdict that included as one of its basis that all evidence demonstrated that the objectionable communication, if it

occured, fell within a conditional business privilege and thus was protected under state law. Subsequently, the case was submitted to the jury by special interrogatories under F. R. Civ. P. 49 and the jury concluded that:

1. Some authorized agent of Defendant company published orally the statement. "That the Plaintiff was personally liable to the Defendant Company for Texas Appliance Centers, Inc. indebtedness..." Special Interrogatory No. 1.

2. The published defamation did not include a statement that the "Plaintiff refused to pay the indebtedness" mentioned in Special Interrogatory No. 1. Special Interrogatory No. 2.

3. These statements were made while the Defendant's employees or agents were acting within the course and scope of their employment. Special Interrogatory No. 4

4. This statement was ratified by the Defendant corporation. Special Interrogatory No. 4.

5. This statement was slanderous. Special Interrogatory No. 5.

6. This statement was false. Special Interrogatory No. 6.

7. Defendant was not activated by malice (from a clear and convincing evidence standard). Special Interrogatory No. 7.

8. Defendant was negligent in making the statement. Special Interrogatory No. 8.

9. Defendant was not grossly negligent. Special Interrogatory No. 9.

10. Defendant was not activated by malice (from a preponderance of the evidence standard). Special Interrogatory No. 10.

11. The Plaintiff suffered injury to his business as a consequence of this slanderous statement. Special Interrogatory No. 11.

12. Plaintiff would be compensated for these damages by the award of $30,000.00. Special Interrogatory No. 12.

13. No exemplary damage should be awarded. Special Interrogatory No. 12.

The Court finds that there is sufficient evidence to support each of these findings and the Court will not reject the conclusions of the jury with regard to Interrogatories Nos. 1, 5 and 12 as urged in particular by the Defendant. Yancy vs Union Carbide Corp., 5 cir. 1965, 353 F2d 672 [1/]

1/ The Defendant challenges the answer to Special Interrogatory No. 12 on the ground that there was no evidence to show damages because the Court had granted the Defendant's motion to strike the damage portions of Plaintiff

Builta's testimony. However, after reviewing the transcript, the Court concludes that the Defedant's motion was granted only with regard to the profit and loss testimony, not Builta's testimony as to his interest damages. The ruling of the Court admitted Builta's testimony on that issue.

TEXAS COMMON LAW SLANDER

After the jury's answers to the Special Interrogatories are accepted, it remains the responsibility of the Court to apply the appropriate law to these facts. American Oil Co. vs. Hart, 5th Cir., 1966, 356 F2d 657.

This case is affected by numerous common law rules. The Court must as a first prerequisite determine whether the statement is capable of being defamatory. Arant vs Jaffe, 436 S.W. 2d 1969, (Texas Civ. App.-Dallas, 1968); Prosser on Torts, 759 (4th Ed. 1971). Thereafter it is the province of the jury to determine whether the statement was in fact

understood to be slanderous. 36 Tex. Jur. 2d, Libel and Slander, §26, 31142. Specifically, the Plaintiff has the burden of establishing each of these elements to support a slander case:

1. That the alleged slanderous words were uttered substantially as plead in the Complaint;

2. That they were defamatory;

3. That they were uttered in the hearing of one or more third persons capable of understanding their defamatory improt;

4. That they were actuated by malice; and

5. The facts to show the amount of the damages. Bull vs. Collins, 54 S. W. 2d 870, 871, (Tex. Civ. App. -Eastland, 1932).

While malice is generally an essential element of slander, there evolved at common

law certain arbitrary categories of defamatory language that, if proven are considered necessarily so damaging to the recipient that malice would be presumed by the Court. Plaintiffs who demonstrated such slander per se received the additional benefit of not being put to the task of proving special (actual) damages.

Express Publishing Co. vs Wilkins, 218 S. W. 614 (Tex. Civ. App.-San Antonio, 1920). One such per se category is language that affects a person injuriously in "his office, profession or occupation." Billington vs. Houston Fire and Casualty Ins. Co., 226 S. W. 2d 494 (Tex. Civ. App.-Fort Worth, 1950). For such words to be slander per se, however, they must be clearly slanderous without reliance on innuendo to explain their meaning. Montgomery Ward & Co. vs Peaster, 178 S. W. 2d 304, 305 (Tex. Civ.

App. -Eastland, 1944).

An additional facet of common law slander is the privilege doctrine that protects the speaker when a statement occurs in a context that has some social justification. Prosser on Torts, 785-795 (4th Ed. 1971). A privilege may occur where the speaker and recipient have a common, legitimate business reason for the exchange of information and the communication is limited and reasonably appropriate to the privilege. Mayfield vs Gleichert, 484 S. W. 2d 619 (Tex. Civ. App. -Tyler, 1972); Arant vs Jaffe 436 S. W. 2d 169 (Tex. Civ. App. -Dallas, 1968); Dun & Bradstreet, Inc. v. O'Neil,456 S. W. 2d 896 (Tex. 1970). The existence of such a privilege is a question of law to be determined by the Court. Mayfield vs. Gleichert, Supra.

If such a privilege is found by the Court, the presumption benefits of the per se category are lost. Plaintiff may still demonstrate defamation but the burden returns to prove malice in fact and actual damages. Wortham vs. Dun & Bradstreet, Inc., S.D. Tex. 1975, 399 F. Supp. 633.

THE LAW APPLIED TO THE STATEMENT AT ISSUE

Applying the facts of this case to the existing law is difficult. Plaintiff must first convince the Court that the statement that the jury found to have been made by the Defendant was slanderous. With regard to Plaintiff's two suggested interrogatories concerning the specific language allegedly communicated (Special Interrogatories Nos. 1 & 2), the jury drew opposite conclusions. While the jury agreed that some agent, servant or employee of the defendant

communicated orally to G. M. Buchanan that the Plaintiff was personally liable for the debt of the Texas Appliance Center, Inc., the jury found that no statement was made to the effect that the Plaintiff refused to pay the indebtedness. Specifically included in each interrogatory was the language that "[I]n defamatory language, it is not so much the idea that the speaker or writer intends to convey as what he does in fact convey."

Plaintiff urges that the statement that he was personally liable for corporate indebtedness constitutes slander per se. However, this Court is hard-put to conclude that this statement is inherently derogatory. It appears to be no more than a comment on one's financial status. Any defamatory connotation must be drawn from the context in which it occurred by innuendo. To supply such an explanation,

Plaintiff points to the fact that the General Electric Company curtailed the Plaintiff's credit and allowances. Plaintiff contends that such a punitive measure necessarily indicates that the statement was understood in a defamatory sense. This argument would appear to be reasonable even though in interrogatory No. 2 the jury concluded that the speaker did not state that the Plaintiff failed to pay his obligations because actions of the Defendant may supply such evidence even though direct statements may not. Nevertheless, even if Defendant shows defamatory import, slander is not established because the requisite malice was not proven.

THE BUSINESS PRIVILEGE

However, even if the statement might be proven to be slanderous, the question remains whether the Defendant established a business privilege to communicate such defamation.

Plaintiff contends (1) That the Defendant never pled, relied on or proved the privilege defense, (2) That the Defendant failed to submit interrogatories to the issue, and (3) That the Defendant may not both deny the existence of the communication and plead a privilege defense in the alternative. After considering each of these arguments, the Court is convinced that they are without merit.

Plaintiff notes correctly that the Defendant never actually pled the business privilege defense. However, if the issue is indeed before the Court and actually litigated by the parties, this is not a fatal defect. Bettes vs Stonewall Ins. Co., 5th Cir., 1973, 480 F2d 92; Gary Pools, Inc. vs. Associated Pools, Inc., 5th Cir. 1965, 340 F. 2d 585. While the privileged defense is not included in the Pretrial Order

under the heading of "Contested Issues of Fact", it was specifically included among the contentions of the parties in such a way as to put the Plaintiff on notice that it was a major issue to be litigated. In addition, the issue was again raised by the Defendant in the motion for directed verdict after the close of Plaintiff's case. (See transcript, page 4, October 20, 1975, afternoon session.)

While Defendant contends in addition that the privilege was insufficiently preserved because the Defendant did not present an interrogatory to the jury on the point, the case law is quite clear that the privilege issue is one for the Court and not the jury. Mayfield vs. Gleichert, supra. The Pretrial Order and motion for directed verdict properly raise the issue before the Court.

Lastly, Defendant relies on an annotation to support the contention that the Defendant must admit the statement before the privelege defense can be raised, 51 A. L. R. 2d 552. However, no Texas cases are cited there with such a holding and those cases from other states that are cited do not indicate a definite majority stand on the issue. Therefore, while it is contradictory to deny the existence of the communication as well as assert a business privilege for making it, there is no requirement under modern procedural rules to plead and prove the case on consistent theories. F. R. Civ. P. 8 (e) (2). Absent explicit holdings to the contracy, this Court sees no reason to require such conformity.

The question remains whether the Defendant actually established the business privilege

by sufficient proof to do so the Defendant must demonstrate that the communication in question was "furnished in good faith to one having a legitimate interest in the information..." Dun & Bradstreet, Inc. vs O'Neil, supra, at 898.

The parties to the suit were involved in on ongoing commercial relationship in several cities in South Texas. Plaintiff purchased appliances wholesale from Gneral Electric Company and resold them on the retail market through three independent outlets. One of these was the Texas Appliance Center, Inc., in Laredo, Texas in which Plaintiff was the major stockholder. The inventory of the Texas Appliance Center, Inc. was financed by the Defendant, General Electric Credit Corporation (GECC), a credit financing agency. General Electric Company participated in this contract as guarantor of a portion of the inventory financed, but it is undisputed that

Plaintiff did not personally obligate himself in any respect for the debts of the Texas Appliance Center, Inc.[2/]

In August, 1970 Texas Appliance Center, Inc., could no longer meet its debts and the Defendant took default judgment against the Company in December, 1970. The Defendant urges that it was under both a contractual and statutory obligation to communicate the default to the General Electric Company. Uniform Commercial Code, §9.504.

Following the default of Texas Appliance Center, Inc., General Electric Credit Corporation advised the Plaintiff that it would no longer involve itself in inventory financing for the Uvalde Appliance Company. In addition, Plaintiff's credit and allowances were cut off by General Electric Company. The jury concluded that some employees or agents of General

Electric Credit Corporation necessarily communicated to General Electric Company the information that Plaintiff personally was liable on the defaulted account.

In the context of this commercial relationship such a communication carried with it the degree of circumscribed self-interest contemplated by the qualified business privilege defense. Plaintiff urges that, even if the Court concludes that some privilege existed, the Defendant was not authorized by statute or contract to communicate to the General Electric Company that Plaintiff Builta was personally liable for the indebtedness 2/ Such a personal Guaranty agreement had been signed by the Plaintiff for the Uvalde Appliance of Uvalde Texas, in which Plaintiff was the majority stockholder.

However, the argument goes, not to defeat the existence of the privilege, but to the extent of negligence or malice with which the defendant made the communication. The jury has answered that issue by finding that the communication was delivered with negligence and not malice.

THE APPLICABILITY OF GERTZ VS. ROBERT WELCH, INC.

During the course of the trial of this case, the question arose whether the case would in any respect be affected by the Supreme Court decision in Gertz vs. Robert Welch, Inc., 418 U. S. 323 (1974). While this Court is still in doubt as to the propriety in extending the Gertz standard to encompass the type of communication that is here at issue, this Court is convinced that the disposition of this case is unaffected by these questions.

The broad language of the plurality opinion in Gertz may arguably be extended to control, suits arising from commercial speech between private figures, but the Supreme Court left to the States considerable leeway to define liability standards for defamation. The primary limitation, however, was that these standards require, at a minimum, private plaintiffs to demonstrate actual fault or malice rather than presumed or strict liability as in slander per se. Thus, the state could if it wished set a higher malice standard for proof of such cases. Even if this Court must of necessity juxtapose Gertz against the facts of this case, the outcome would be no different because Plaintiffs here were required to prove actual malice before recovery could be permitted. They have not done so and, consequently, judgment must be directed in favor

of the Defendant.

The Clerk will file this Memorandum and Order and furnish counsel for all parties with a true copy.

Done at Houston, Texas, this 12th day of May, 1976.

/s/ Woodrow Seals
United States District Judge

JUDGMENT

(Number and Title Omitted)

Filed: May 12, 1976

In accordance with the Memorandum and Order filed this date, judgment shall be entered in favor of the Defendant.

The Clerk shall send a true copy of this judgment to all parties.

Done at Houston, Texas this 12th day of

May, 1976.

/s/ Woodrow Seals
United States District Judge

(Number and Title Omitted)

Filed: July 5, 1978

Appeal from the United States District Court
for the Southern District of Texas

[June 7, 1978]

Before COLEMAN, AINSWORTH, AND VANCE, Circuit Judges.

PER CURIAM:

This case was orally argued in New Orleans on May 18, 1978.

Upon consideration of the record, briefs, and the said oral argument, the judgment of the District Court is affirmed under the provisions of our Rule 21.[1]

AFFIRMED.

(1) See N. L. R. B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970 430 F. 2d 966.

(Number and Title Omitted)

PETITION FOR REHEARING

TO THE HONORABLE THE SAID COURT:

The Appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled and numbered cause, and in support of this petition represents to the Court as follows:

I

The Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself to two (2) questions only:

1. Did this Honorable Court err in affirming that conclusion of law of the trial court that under Texas law malice is an essential element in a slander case?

2. Did this Honorable Court err in affirming that finding of fact of the trial court that the

defendant actually established the business privilege by sufficient proof?

In affirming this case under the provisions of Rule 21 of the Local Rules of this Court, the Court has impliedly determined

1) That the judgment of the District Court is based on findings of fact which are not clearly erroneous;

2) That no error of law appears; and

3) An opinion would have no precedential value.

We are then relegated to the Record on Appeal and the opinion of the District Court in an effort to point out to this Honorable Court why it erred in affirming that finding of the trial court that a qualified privilege existed, and in concluding that in Texas malice is an essential element of slander.

II

The Appellant suggests that the cases cited by him in his Brief conclusively established that in Texas malice is not an essential element of slander. As a matter of fact, the Appellee does not seriously contend in its reply brief that the law is to the contrary. Malice becomes important only when a privilege or qualified privilege is involved, and, therefore, the question of whether the communication was qualifiedly privileged becomes of paramount importance in this case.

III

In its Memorandum and Order of May 12, 1976, the District Court made, among others, the following statements regarding qualified privilege:

"Thereafter, the Court took under advisement the Defendant's Motion for a directed verdict that included as one of its basis that all evidence

demonstrated that the objectionable communication, if it occurred, fell within a conditional business privilege and thus was protected under state law."

* * *

"* * *. A privilege may occur where the speaker and recipient have a common, legitimate business reason for the exchange of information and the communication is limited and reasonably appropriate to the privilege. * * * The existence of such a privilege is a question of law to be determined by the Court."

* * *

"The question remains whether the defendant actually established the business privilege by sufficient proof. To do so the Defendant must demonstrate that the communication in question was 'furnished in good faith to one having a legitimate interest in the information...'"

"* * * General Electric Company[1/] participated in this contract as guarantor of a portion of the inventory financed----"

"* * * The Defendant urges that it was under both a contractual and statutory obligation to communicate the default to the General Electric Company. Uniform Commercial Code, Sec. 9.504."

* * *

"In the context of this commercial relationship such a communication carried with it the degree of circumscribed self-interest contemplated by the qualified business privilege defense."

The Appellant respectfully submits that the Judgment of the District Court is based on a clearly erroneous finding of fact, to-wit: that the defendant actually established the business privilege by sufficient proof.

The Appellant suggests that the pertinent portions of the testimony adduced on the trial of this

relating to qualified privilege are shown at the following places in the Appendix:

Mr. Bennet B. Patterson, attorney for General Electric: Lines 12 thru 23, p. 28; Lines 20 thru 25, p. 29 and lines 1 thru 6 p. 30.

Mr. Doyle Dunbar, Houston Zone Manager of GECC and the designated representative of GECC to assist at trial: Lines 20 thru 25, p. 36; Lines 1 thru 10, p. 37; Lines 20 thru 25, p. 43; Lines 1 thru 13, p. 44; Lines 21 thru 24, p. 48, Lines 18 thru 25, p. 52; Lines 1 thru 25, p. 53; Lines 18 thru 22, p. 58; Lines 2 thru 25, p. 59; Lines 1 thru 10, p. 60; Lines 6 thru 13, p. 61; Lines 6 thru 17, p. 62; Lines 20 thru 25, p. 536, and Lines 1 thru 19, p. 537.

Mr. Gerald Buchanan, Zone Credit Manager for General Electric Corporation (GE):

-1/ For the purpose of brevity in this brief, General Electric Corporation will be referred to as "GE" and the Appellee, General Electric Credit Corporation,

will be referred to as "GECC".

Lines 17 thru 25, p. 72; Lines 1 thru 25, p. 73; Lines 1 thru 19, p. 74; Lines 12 thru 25, p. 76; Lines 1 thru 25, p. 77; Lines 1 thru 13, p. 78; Lines 15 thru 25, p. 83; Lines 18 thru 21, p. 105; Lines 1 thru 25, p. 109; Lines 3 thru 12, p. 112; Lines 8 thru 13, p. 119; Lines 6 thru 10, p. 126; Lines 16 thru 20, p. 126, and Lines 10 thru 15, p. 519.

Mr. John Poole, Area Operating Manager for GECC: Lines 8 thru 25, p. 139 and Lines 4 thru 16, p. 142.

Samuel Builta- Plaintiff:

Lines 6 thru 14, p. 273; Line 25 p. 374; Lines 1 thru 12, p. 375; Lines 9 thru 14 p. 410; Lines 3 thru 25, p. 421; Lines 13 thru 25, p. 493 & Lines 1 thru 7, p. 494.

The attorney for General Electric Corporation testified that the GECC is not a part of the

General Electric Corporation, and that they are separate corporations.

Mr. Martin Beirne, one of the trial attorneys for GECC, represented to the Court that there was no evidence of control by General Electric Corporation over General Electric Credit Corporation in this case, or vice-versa, and that General Electric and GECC have been shown to be distinct, separate corporate entities.

The Trial Judge at page 76 of the Record on Appeal stated that if GECC is a distinct corporation but a wholly owned subsidiary, but separate at the management level, that the libel would run towards General Electric as to any third party. Mr. Martin Beirne stated the Court's position was correct. (pp. 76 and 77 of Record on Appeal).

Mr. Beirne further represented to the Court that there are two distinct corporate entities--two distinct operations before the Court. (p.105 ROA)

In response to the following question from the Court, "Is it a slander for an employee of the parent corporation to tell an employee of the wholly owned subsidiary of a parent corporation that one of the customers of both of them is financially irresponsible," Mr. Martin Beirne responded, "If you have two separate and distinct corporations." The Court then stated, "Like we have here?"

Mr. Sam Hood, lead counsel for GECC, at the trial stated to the Court that there was no possible way for GECC to be held responsible for something that GE did--that they operate as separate entities.

Mr. Doyle Dunbar, Houston Zone Manager of GECC, testified that his credit decision was completely independent. He further testified that how GECC was going to collect the money from Texas Appliance Centers was none of General Electric Corporation's business. He further

testified that his office operates completely independently from General Electric Corporation.

Mr. Gerald Buchanan, Zone Credit Manager for General Electric Corporation, testified that GECC has no direct connection with his office and there is no intermingling of management at his level.

Mr. Buchanan further testified that he was dealing with General Electric receivables and what GECC did was their business--that there was no tie-in between the two companies.

Mr. John Poole, Area Operating Manager for GECC, testified that GECC was set up to handle inventory financing for dealers, whether it be General Electric or others.

While it may be that the re-purchase agreement between General Electric and GECC was introduced, counsel for Appellant cannot find it and it is not a part of the Appendix in this case. The evidence

clearly shows, however, that only GECC had a lien on the property of Texas Appliance Centers, but they did have a right to return any General Electric merchandise to General Electric for full credit, if they cared to. General Electric guaranteed no part of Texas Appliance Centers' indebtedness to GECC.

Mr. Dunbar testifed that the Texas Appliance Centers' indebtedness was not underwritten by General Electric Corporation-- that GECC may return General Electric merchandise to General Electric and will be paid therefor.

Mr. Buchanan testified General Electric had a re-purchase agreement with GECC--that if GECC has to pull back their merchandise and make it available to me, General Electric would pay GECC off.

Mr. Poole testified General Electric had no interest in the merchandise until GECC chose to turn it over to them. He further testified that

pursuant to the suit brought by GECC against Texas Appliance Centers, all of the equipment and stock sequestered by the Sheriff was sold at public sale to GECC, and that all the merchandise was turned over to GE for credit.

Therefore, at the time of the transfer of the GECC merchandise to GE by GECC was not transferring collateral--on the contrary, it was transferring merchandise to which GECC had the legal title by virtue of the foreclosure sale. GE had no rights whatsoever against Texas Appliance Centers by virtue of the transfer and could not have been subrogated to any rights of GECC against Texas Appliance Centers.

In Rangel v Bock Motor Co., 437 SW2 329, (Tex. Civ. App.-Austin, 1969) wr. ref'd, nre, the Court goes into a somewhat lengthy discussion regarding the provisions of Sec. 9.504 of the Business and Commerce Code, and reference is

made thereto.

Section 9.504 of the Texas Business and Commerce Code (Uniform Commercial Code) is clearly not applicable, since collateral was not transferred. If such section had been applicable, GE would have been subject to the provisions of Part 5 of Section 9. GE effectively avoided this by receiving the merchandise not as collateral from a lienholder, but from the true owner, GECC, who had purchased the merchandise at public sale.

SUMMARY

The Court held in its opinion that the Defendant must demonstrate that the communication in question was "furnished in good faith to one having a legitimate interest in the information..." It further stated that "In the context of this commercial relationship such a communication carried with it the degree of circumscribed self-interest contemplated by the qualified business privilege defense."

While it is true that ordinarily whether a publication or communication is privileged is a question of law for the court, it is also true that whether the Defendant rested under a duty to the person to whom the communication was made is a question of fact. See 36 Tex. Jur. 2d at p. 493 and Davis v Wells, 60 SW 566.

Privilege is an affirmative defense in the nature of confession and avoidance both under Federal and Texas Rules. See Rule 8 (c) of the Federal Rules of Civil Procedure and Rule 94 of the Texas Rules of Civil Protedure. The ultimate burden of proof on an issue is a substantive matter and is to be governed by state law. 2/ See Federal Practice and Procedure, Vol. 5, pp. 319-320.

2/ Note: Counsel for Appellant apologizes for having foolisly suggested in his proposed Supplemental Brief (which was not permitted to be filed) that the question of omitted issues was covered by Texas law.

See also Erie RR v Tomkins, 304 US 64, and Transammonia Export Corp. v Conserv, Inc., 554 F2 719, 5 Cir. 1977.

It is true that under the provisions of Rule 49a of the Federal Rules of Civil Procedure, that as to omitted issues each party waives its right to a trial by jury of the issue so omitted, and the Court may make a finding thereon of, if it fails to do so, the Court shall be deemed to have made a finding in accord with the judgment of a special verdict.

Nevertheless, the trial court and this Honorable Court in making such finding, either expressed or implied, are bound by the same rules as would be the jury if the jury had answered such special issue. That is, there must be sufficient evidence to sustain the finding of fact.

In a civil suit the party with the burden of proof must prove his case by a preponderance of the evidence. See Strachan Shipping Co. v Shea, 406 F2d 521, 5th Cir., 1969. See also 30 Am. Jur. 2d 337, and the Federal cases cited therein. Defendant has the burden of proof on privilege.

The Fifth circuit has repeatedly held that in diversity cases Federal Courts apply a federal rather than a state test for the sufficiency of evidence to create a jury question. See Boeing Co. v Shipman, 411 F2d 365, 5th Cir. 1969. See also Midland Ins. Co. v Market Service, Inc., 548 F2d 603, 5th Cir. 1967, and Reyes v Wyeth Laboratories, 498 F2d 1264, 5th Cir. 1974.

The test established by the Fifth Circuit to determine whether there is sufficient evidence is set forth in the Boeing case.

A scintilla of evidence is not sufficient to uphold a finding of fact. It appears that under the

ruling of this Court in the Boeing case, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, a finding of fact may be set aside based upon insufficient evidence. If, however, there is substantial evidence, that is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, then the finding of fact may be affirmed. Therefore, the Trial Court had to find that there was substantial evidence that the defamatory communication was furnished in good faith by GECC to GE who had a legitimate interest in the information. There is not a scintilla of evience to uphold this express or implied finding. The officers of GE and GECC denied that there was any connection whatsoever between the operation of GE and the operation of GECC. Each of them stated

that they were separate and distinct corporations. Additionally, both Trial Counsel for GECC made statements to the Court that the two companies operated as separate entities and were two separate and distinct corporations. Patently, Section 9.504 of the Business and Commerce Code is not applicable.

That GE had no legitimate interest in the information furnished is clearly brought out by Mr. Doyle Dunbar, Houston Zone Manager of GECC, when he testified that how GECC was going to collect the money from Texas Appliance Centers was none of GE's business.

Under the test set out in Boeing, supra, the express or implied finding of the Trial Court should be set aside as not based on any evidence, or at the very least, on insufficient evidence.

The Appellant respectfully represents that an opinion in this case would have great precedential value in that it would establish once and for all that

malice is not an essential element of slander in Texas; that an express or implied finding of the Court must be based on substantial evidence under Boeing, and that the provisions of the Uniform Commercial Code, Section 9.504 are not applicable after a foreclosure sale is had by the initial lienholder.

WHEREFORE, for the reasons set forth herein, as well as those set forth in Appellant's Brief, the Appellant respectfully requests that this Petition for Rehearing be granted, and that the judgment of the Trial Court be reversed and rendered in favor of the Appellant for the sum of $30,000.00, and, alternatively, that the case be reversed and remanded for new trial under proper instructions of the Court concerning the alleged errors committed on the first trial.

(signature and certificate of service are omitted herein)

(Number and Title Omitted)

Filed: July 5, 1978

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(July 5, 1978)

Before COLEMAN, AINSWORTH AND VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Jas. G. Coleman
United States Circuit Judge